SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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# No. 338

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CARROLL FRANKLIN JOHNSTON, AN INFANT, BY REBECCA L. GERMAN, HIS NEXT FRIEND AND GUARDIAN, AND REBECCA L. GERMAN, IN HER OWN RIGHT,

*Petitioners,*

*vs.*

W. F. JOHNSTON, MAMIE L. JOHNSTON, LUCY J. IDEN, ET AL.

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## BRIEF FOR PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

I.

### Opinion of Court Below.

The opinion of the Supreme Court of Appeals of Virginia on the first appeal is reported in 181 Va. 357, 25 S. E. (2d) 274, and is set out in the Transcript of the Record at pages 99-101. No opinion of the Supreme Court of Appeals on the *second appeal* was rendered, but the *final* decree of March 13, 1944, is set out in the Transcript of the Record at pages 196-197.

## II.

### Jurisdiction.

1. The jurisdiction of the Court is invoked under Judicial Code, Section 237, as amended by the Act of February 13, 1925.

Some of the cases sustaining the jurisdiction of this Court are: *Meister* v. *Moore, etc.*, 6 Otto. 76, 96 U. S. 76, 24 L. Ed. 826; *Press Pub. Co.* v. *Monroe*, 164 U. S. 367; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 859 at 861.

2. The date of the final decree sought to be reviewed in the petition for writ of certiorari is March 13, 1944, and is set out in the Transcript of Record at page 197, and the time for filing the petition for certiorari in this cause was extended to and including August 12, 1944, by Hon. Harlan F. Stone, Chief Justice of the United States, in June 9, 1944 (R. 198).

3. The suit was in equity and was brought to establish: (1) that Carroll Franklin Johnston, an infant, was the son and only child of Manley Allen Johnston, now deceased, and Rebecca L. Johnston (now German), and as such was the next of kin, sole heir at law and distributee of his said father's estate and inherited it under the laws of descendents of Virginia, Sections 5264 and 5270 of the Code of Virginia, 1942, subject only to the marital or dower right therein of his said mother, Rebecca L. Johnston (now German), and to quiet his title in said estate and for general relief and (2) to show that said Rebecca L. Johnston, the mother of the infant petitioner, Carroll Franklin Johnston, was the common law wife of said Manley Allen Johnston when coition took place, and that your petitioner, Carroll Franklin Johnston, as such legitimate issue of Manley Allen Johnston became the owner of his estate at his death,

subject only to the dower right of his said mother, Rebecca L. Johnston, therein, under the general law and especially under Section 5270 of the Virginia Code, 1942, which declares: "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate", of which estate and property the petitioners were deprived by the said final decree of the Supreme Court of Appeals of Virginia and denied the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, which, among other things, provides that, "no person * * * shall be deprived of his * * * property without due process of law; nor denied the equal protection of the law.

III.

**Statement of Cause.**

1. A summary history and statement of the cause, the issues, and the jurisdictional questions presented, have been set out in the Petition for Writ of Certiorari under the heading, "History of Cause and Summary Statement of Matter Involved", on pp. 2-5, which statement is here adopted and is asked to be read as if set out herein in totidem verbis, and in the interest of brevity will not be repeated at this point, further than to recite briefly some of the pertinent and uncontradicted evidence.

2. The evidence further showed that Manley Allen Johnston, a well to do farmer and about 35 years of age, met Rebecca L. Edmonds (referred to in the caption of this cause as Rebecca L. German, her present husband's name), then a beautiful girl 15 years old, and became so attracted to her that he thereafter hired and induced her father to leave the farm at the Plains in Fauquier County, Virginia, where he was then employed and living happily with his

family, and move on to one of the farms of said Manley Allen Johnston in said County, where he frequently visited them and saw, courted, wooed and won her heart and love, and became engaged to marry her (R. 23, 25, 26-27), and entered into a common law marriage with her when she was a young girl 16 years old.

### Excerpts of Evidence

The uncontradicted testimony of Mrs. Rebecca L. German (R. 26-27) shows:

> "Q. Then what occurred? You will have to be plain and tell just what happened.
>
> A. Well, at that time I was so much in love with Allen that I didn't think anything was wrong he wanted me to do. He wanted to talk about getting married, but I thought so much of him I didn't want to turn his people against him on my account so that is the first time we had intercourse together and from that time we was the same as man and wife.
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> * * * * * * *
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> "Q. You speak as your having been the same as man and wife, will you please be perfectly candid and open about this thing and tell what you mean by 'you were the same as man and wife'?
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> A. Well, after that night the next day Allen went away and bought me a wedding ring and he came back and when I went to milk he came down to meet me and put it on my finger and told me that we was just as much married as we could ever be.
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> Q. What kind of ring was it?
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> A. It was a white gold wedding ring with four little diamonds across the top.
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> Q. Was it a band ring?
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> A. Yes, sir.
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> Q. Did he put it on your finger himself and tell you that it was your wedding ring?

A. Yes, sir.
Q. And how old were you then?
A. Sixteen.

. . . . . .

"Q. Did or did it (ring) not have anything inside, engraved or otherwise? (Parenthesis ours.)
A. Yes, sir, it did.
Q. Please state what it was?
A. It was initials in the inside 'From A. M. J. to R. L. J.'
Q. And he told you that was your wedding ring?
A. Yes, sir.
Q. Now from that time out, what were the other relations, if any, between you, simply as lovers or otherwise?
A. No, sir, it wasn't as lovers, it was man and wife. We lived as man — wife. I loved him and I thought he was my husband and I knew he knew I was his wife.
Q. Well, were there any further sexual relations between you and him from that time?
A. Yes, sir.
Q. And how long did those relations continue?
A. Until he died.
Q. Well, was Mr. Johnston kind to you and did he provide you with what you needed?
A. Yes, sir, he gave me more than I needed."

Testimony of Mrs. Aneliza Edmonds, R. 148:

"Q. Well, you might go on and tell what did happen?
A. Well, he (Johnston) claimed him and her got married. That was before the baby was born. (Parenthesis ours.)
Q. Did he say anything about having given her a wedding ring?
A. He gave her a ring, yes, Sir.
Q. Did you see the ring on her finger?
A. Yes, sir."

Thereafter Manley Allen Johnston held her out and introduced her "as his wife", treated her "as his wife", supported her, and they lived together "as husband and wife" in Virginia, District of Columbia, Baltimore, Maryland, and New York, and kept house "as man and wife". Their child, Carroll Franklin Johnston, was born to them as a result of their said common law marriage, and Manley Allen Johnston as long as he lived recognized this child as his. (R. 35-38; 41-42; 44-46; 55-61).

When Rebecca L. Johnston went to a hospital, gave birth to their only child, Carroll Franklin Johnston, Manley Allen Johnston went there and *then* recognized their said infant was *his* child, paid all the hospital bills (R., pp. 30-32, 35-38, 41-42), and thereafter he supported, gave money to, and provided for them as his wife and son as long as he lived, undertook to give his son a good education, put him through High School, and repeatedly stated that he wanted him to have whatever estate he, Manley Allen Johnston, his father, owned when he died. (R., *41-42,* 28-31, 32, 37-38, 43-47, 48, 54-58, 61, 80, 84, 91, 110-111, 114, 117-120, 148-149, 151-152, *156,* 170, *192*-193). The above evidence was uncontradicted and conclusively established a common law marriage, certainly for the purpose of legitimatizing the issue.

The defendants did not introduce any evidence whatever. (See "Judgment", R., pp. 196-197).

Under the above cited evidence, and the Virginia statute, Code, 1942, Annotated, Sections 5269 and 5270, and the decisions of the Supreme Court of Appeals of Virginia, even if the common law marriage between Rebecca L. Johnston (nee Edmonds) and Manley Allen Johnston should be regarded "null in law" as between them for want of a license and a civil or religious ceremony, such marriage was nevertheless legitimate *as to the issue of such common law marriage,* Carroll Franklin Johnston.

## IV.

### Specification of Errors.

1. Under the heading, "Questions Involved and Presented and Reasons Relied on for the Allowance of the Write of Certiorari Herein", the errors have been given in the petition for the Writ at pages 6-9, and in the interest of brevity they are not repeated, but are here adopted as if set out in *totidem verbis*.

In addition the Supreme Court of Appeals of Virginia has erred in holding:

2. That no common law marriage or marriage of any kind ever existed between the said Manley Allen Johnston and said Rebecca L. Johnston (nee Edmonds), father and mother of your petitioner, Carroll Franklin Johnston.

3. That your petitioner, Carroll Franklin Johnston, was *not* the "legitimate issue" of a common law marriage between Rebecca L. Edmonds and Manley Allen Johnston who had since died intestate, and that the petitioner, Carroll Franklin Johnston, did *not* inherit his father's estate, under the Virginia Statute of descents, Code of Virginia, 1942, Annotated, Section 5264, which provides: "Course of descents generally.—When any person having title to any real estate of inheritance shall die *intestate* as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, as are not alien enemies, in the following course: First. *To his children* and their descendants", and Sections 5269 and 5270 of the Virginia Code, 1942, Annotated, the latter of which declares: "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."

4. That Manley Allen Johnston and Rebecca L. Johnston (nee Edmonds) did *not* have *the right to* contract or enter into a common law marriage, which right was not denied

to them by any statute; and which right is embraced in the conception of liberty as guaranteed by the Constitution. *Allgeyer* v. *La.*, 165 U. S. 578; 41 L. Ed. 832 at 836-837; *Lochner* v. *N. Y.*, 198 U. S. 45; *Adair* v. *United States*, 208 U. S. 161.

5. In holding that Carroll Franklin Johnston, an infant, the sole child and issue of said common law marriage, was *not* the "legitimate issue" of Manley Allen Johnston and did not inherit the estate of his said father, who died intestate, and that his mother, Rebecca L. Johnston (nee German), was *not* entitled to dower in the said estate. These holdings are in violation of Title 2, Chapter 2, Section 2, and Sections 5117, 5264, 5269 and 5270 of the Code of Virginia, 1942, Annotated, and of the Fourteenth Amendment to the Constitution of the United States, and contrary to the applicable decisions of this Court. In *Meister* v. *Moore*, 96 U. S. 76, this Court held: "In the absence of any State statute declaring that marriages not celebrated in the manner therein prescribed shall be void, *that any marriage regularly made* according to the common law, without observing the State statute regulations, *is a valid marriage.*"

## V.

## Summary of Argument.

POINT A. The conclusive evidence introduced in this case, the statute laws of Virginia, the decisions of the Supreme Court of Appeals of Virginia, the highest court of that State, and the decisions of the Supreme Court of the United States and other Federal Courts, all show that the petitioner, Carroll Franklin Johnston, the infant son and innocent and unoffending offspring of the common law marriage entered into between Manley Allen Johnston and Rebecca L. Johnston (herein referred to as German), has been deprived, by the final decree of the Supreme Court of Ap-

peals of Virginia entered in this cause, of his legitimacy, his right to inherit the property and estate of more than $95,000.00, of which his father, Manley Allen Johnston, died seized and possessed, and intestate, and has thereby denied him the equal protection of the law, the statute laws of the State of Virginia as construed by the decisions of the Supreme Court of Appeals of that State, its highest court, and the decisions of this and other Federal Courts, and of the Courts of last resort of other States, and is in violation of the Fourteenth Amendment of the Constitution of the United States, which, among other things, provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due proces of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Point B. This suit was brought in equity to establish: (1) that a common law marriage had been entered into between Manley Allen Johnston (now deceased) and Rebecca L. Johnson (nee Edmonds) in the State of Virginia; and (2) that Carroll Franklin Johnston was the infant son, only child and the legitimate issue of Manley Allen Johnston, now deceased, and Rebecca L. Johnston (now German) by their said common law marriage, and as such inherited his said father's estate under the laws of descents, Code of Virginia, 1942, Annotated, Section 5264, which provides: "When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass * * *: First. To his children and their descendants", and under Sections 5269 and 5270 of said Code, which provide: "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."

POINT C. Under this Statute, Carroll Franklin Johnston, the infant, is the legitimate issue of said common law marriage, even if it should be regarded, by the courts of Virginia, as "null in law" as between Manley Allen Johnston and Rebecca L. Johnston (nee Edmonds) for want of a license and a civil or religious ceremony.

This has been so held by the Supreme Court of Appeals of Virginia in *Goodman* v. *Goodman*, 150 Va. 42 at 45-46, where it is said:

> "(2) These statutes are remedial in their nature and should be liberally construed. When so construed it is apparent that the object and purpose of their enactment was to remove the stain and disabilities of bastardy from all 'innocent and unoffending' children who for any cause might be classed as illegimate. * * *
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> Section 5269 should be read in the light of the other two sections. * * *
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> (3, 4) Every marriage is either *valid or invalid*, and section 5269 does *not* declare that the marriage between the man and the woman *shall be a valid marriage in order to legitimate a child born before the marriage. Since section 5270 legitimates children born after the celebration of a void marriage, it seems clear* that the word 'intermarry', which appears in section 5269, is used in its broadest sense *and was intended to include every marriage, valid or void, entered into* in accordance with the forms and ceremonies of the law, *even though one of the parties was incapacitated to enter into the marriage contract.*"
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> "The case of *Stegall* v. *Stegall*, Fed. Cas No. 13351, 2 Brock. 258, was decided by Chief Justice Marshall in the Circuit Court of the United States for the District of Virginia and North Carolina, in 1825. The case arose in Virginia, and the Virginia statute in force at the time, substantially the same as the present statute, provided as follows: 'Where a man having by a woman one or more children shall afterwards intermarry with such

woman, such child or children, if recognized by him, shall be thereby legitimated. The issue also in marriages deemed null in law shall nevertheless be legitimate.' Va. Code 1919, section 19, page 357." Id. page 50, where the Court further said:

"It is a general and well-settled principle in the law of marriage that if one of the parties is at the time the lawful wife or husband, as the case may be, of another person, the marriage is void as between the contracting parties, * * *.

"*But the fact that such a marriage will be void as between the parties to it*, or that the guilty one of the contracting parties will have committed the crime of bigamy under section 1216 of the statutes, *does not necessarily mean that the children begotten and born before such marriage shall not be legitimated by the marriage, or that such children will be denied the right to inherit from their father under the statute of descent and distribution.*" 3 Ruling Case Law, Sec. 3, pages 723-4.

In *McClaugherty* v. *McClaugherty* (decided Sept. 9, 1942) 180 Va. 51 at p. 64, the Supreme Court of Appeals of Virginia, construing said statutes, 5269 and 5270, said:

"These decisions of the Supreme Court of Appeals of West Virginia, and dicta of the distinguished judges of our own Supreme Court of Appeals, concurred in by the entire court, are each entitled to much respect. *They concur in construing section 5270 to legitimatize the issue of common law marriages.* This construction is supported by sound reasoning from the Virginia decision. There is *no Virginia authority to the contrary.*

"*To deny* the protection of this section *to the innocent and unoffending offspring of common law marriages*, requires the most narrow and technical construction of the phrase 'marriage deemed null in law', *defeats* the *intention of the Legislature* as determined by our *Virginia* court, and *violates* the principle of liberal construction laid down by them."

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> "If the Legislature has legalized children begott-n in open fornication where there is *no* marriage, *or* semblance of marriage, it is a reasonable presumption that they at the same moment, and by the same clause, meant also to include the offspring of marriages, which, though void in law, and unfortunate, may be nevertheless excusable and even innocent."

and at page 65 said:

> "I am, therefore, of the opinion, that complainant is the *legitimate* daughter (here it would be son) of the defendant, and as such is now entitled to reasonable support and maintenance from him", * * *.

POINT D. The above authorities show that the petitioner, Carroll Franklin Johnston, the infant child and legitimate issue of the common law marriage between Manley Allen Johnston and Rebecca L. Johnson (nee Edmonds), has been denied the protection of the above State statutes and deprived of the estate which he inherited from his father as those statutes have been construed by the Supreme Court of Appeals of Virginia itself. There was no opinion handed down by that Court in this cause, and the State Court appears to have overlooked its former decisions construing the above State statutes,—and has denied the petitioner, the infant child, the benefit and the equal protection of the said State statutes as construed by its own decisions. This Honorable Court in construing said statutes is not bound by the final decree of the Supreme Court of Appeals of Virginia here complained of, but will look to the language, substance and intent of the statutes and the construction placed upon them by the Supreme Court of Appeals of Virginia in its above decisions, and will give effect to the State statute as applied, construed and enforced by the State in its said decisions. *St. Louis Sw. Ry. Co.* v. *Ark.*, 235 U. S. 350 at 362, 39 S. Ct. 99, 59. L. Ed. 265; *Hoover F. Ins. Co.* v. *Harding,* 272 U. S. 494 at 509-510, 47 S. Ct. 179, 71 L. Ed. 372, 49 A. L. R. 713.

POINT E. The final decree of the Supreme Court of Appeals of Virginia is also in conflict with all the evidence, which is conclusive, and established a common law marriage between Manley Allen Johnston and Rebecca L. Johnston, under all the law and authorities. They hold that:

> "No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required; and as marriage is said to be a contract jure gentium, that consent is all that is required by natural or public law." 2 Kents Commentaries, 13 Ed., p. 87.

The authorities all hold that if the contract of marriage, whether per verba de praesenti or de futuro, be followed by cohabitation and consummation it is a valid marriage in the absence of all civil regulations to the contrary, which the parties cannot dissolve. In *Meister* v. *Moore*, 96 U. S. 76, 24 L. Ed. 826, this Court held:

> "In the absence of any positive State statute declaring that all marriages not celebrated in the manner therein prescribed shall be void, that any marriage regularly made according to the common law without observing the statute regulation, is a valid marriage. * * *
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> "As before remarked, the (State) statutes are held merely directory; because marriage is a thing of common right; because it is the policy of the State to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law.
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> "The Michigan statute differs in no essential particular from those of other States which have generally been so construed. It does not declare marriages void which have not been entered into in the presence of a minister or a magistrate. It does not deny validity to marriages which are good at common law." (Parenthesis supplied.)

What this Court said supra as to the Michigan statutes is equally true as to the Virginia statutes, which do not expressly inhibit common law marriages. But, be this as it may, the Virginia statute, Section 5270, supra, expressly recognized common law marriages in Virginia for the purpose of making the issue of such marriages legitimate, and this even though they "be deemed null in law, or dissolved by a court." This statute includes common law marriages. It was so held by the Supreme Court of Appeals of Virginia in *McClaugherty* v. *McClaugherty* quoted *supra* at page 24.

*Jewell* v. *Jewell*, 42 U. S. 108, 1 How. 234, this Court said:

> "If the contract be made per verba praesenti and remains with cohabitation, or if made per verba de futuro and be followed by consummation it amounts to a valid marriage which the parties * * * cannot dissolve, and is as equally binding as if made in facie ecclesiae."

Certainly, as to Carroll Franklin Johnston, the sole child and issue of the common law marriage between Manley Allen Johnston and Rebecca L. Edmonds, made per verba de presenti as well as per verba de futuro, accompanied and consummated by cohabitation (R. 26-27, 148).

"The equal protection of law is equal protection to all based upon justice under the law." *Pierre* v. *State of La.*, 59 S. Ct. 536, 306 U. S. 354, 83 L. Ed. 757, reversing *State* v. *Pierre*, 180 So. 630, 189 La. 764.

A common law marriage is one by mutual consent; and an implied contract of marriage is as binding and effective as one entered into by written or spoken words. *Ackerman* v. *Ackerman*, 115 Fed. 124, 52 C. C. A. 568, 4 Bigelow Ins. Cas. 181; *U. S.* v. *Route*, 33 Fed. 246. A common law marriage may be established by an inference from the

facts of living together as man and wife, cohabitation, admissions and statements of the parties, and holding themselves out as man and wife to the public. *Hamlin* v. *Grogan*, 257 Fed. 59, 168 C. C. A. 227; *Payne* v. *Payne*, 295 Fed. 970, 54 App. D. C. 149. In the instant case Manley Allen Johnston repeatedly admitted and stated that he and Rebecca L. Johnston were man and wife, but, if he had denied such marriage, it would not have prevented the petitioner, Carroll Franklin Johnston, from being the legitimate issue of such marriage or prevented him from inheriting his father's estate.

POINT F. Under the final decree of the Supreme Court of Appeals of Virginia here complained of the petitioner, Carroll Franklin Johnston, the innocent child and issue of the said common law marriage, is denied the equal protection of the statute because children born of common law marriages entered into in Virginia are denied legitimacy and the right of inheritance under that final decree: whereas children born of common law marriages in other States would be legitimate and inherit the estate located in Virginia of their parents under common law marriages entered into in other States. Carroll Franklin Johnston, therefore, one of the petitioners, has thus been denied by the final decree of the Supreme Court of Appeals of Virginia the equal protection of the State statute—laws of Virginia, Sections 5269 and 5270, and deprived of his right to inherit his father's estate, and as the innocent issue of a common law marriage has also been denied justice under the law, and the benefit and protection of the Fourteenth Amendment of the Constitution of the United States which provides that no State shall deprive any person of property or deny to any person within its jurisdiction the equal protection of the law. As was pointed out supra, pp. 19-22, Sections 5269 and 5270 of the Code

of Virginia, 1942, Annotated, do not declare or require that the common law marriage between a man and a woman shall be valid in order to legitimatize a child born of that marriage, but Section 5270 of the Code of Virginia expressly provides: "The issues of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."

POINT G. It is respectfully contended that a common law marriage having been entered into between Rebecca L. Edmonds and Manley Allen Johnston, and each of them having held themselves out to the public as man and wife, and having lived together as such from the time of their said common law marriage until his death, that she under the laws of Virginia, Code, Section 5117, was entitled to her dower in one-third of all of the real estate of which her husband died seized and possessed, and in his personal property left after the payment of his debts.

**Conclusion.**

For the above reasons and law, it is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the said final decree and decision of the Supreme Court of Appeals of Virginia and finally reverse it.

Respectfully submitted this August 11, 1944.

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## ADDENDA.

### State Statute.

Virginia Code of 1942, Annotated.
Title 2, Chapter 2, Section 2:

> "The common law.—The common law of England, so far as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the General Assembly."

"Section 5117. Of what a widow shall be endowed.—A widow shall be endowed of one-third of all the real estate whereof her husband, or any other to his use, was, at any time during the coverture, seized of an estate of inheritance," * * *.

"Section 5264. Course of descents generally.—When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, as are not alien enemies, in the following course:

First. To his children and their descendants."

"Section 5269. When marriage legitimates children.—If a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, if recognized by him before or after marriage, shall be deemed legitimate."

"Section 5270. Issue legitimate, though marriage null. The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."